INDEX

	Page
Opinions below	1
Jurisdiction	1
Question presented	2
Statutes involved	2
Statement	3
Argument	7
Conclusion	10

CITATIONS

Cases:

Betts Baking Co. v. *National Labor Relations Board*, 380 F. 2d 199	9
Int'l Assn. of Machinists v. *National Labor Relations Board*, 311 U.S. 72	9
National Labor Relations Board v. *Gissel Packing Co.*, 395 U.S. 575	7, 8
National Labor Relations Board v. *Patent Trader, Inc.*, 415 F. 2d 190	8

Statutes:

National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, *et seq.*)	2
Section 2(2)	9
Section 2(11)	6
Section 2(13)	9
Section 7	2
Section 8(a)(1)	2-3, 6, 7, 8
Section 8(a)(5)	6, 7, 8

In the Supreme Court of the United States

OCTOBER TERM, 1969

No. 1160

L. B. FOSTER COMPANY, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-8a) is reported at 418 F. 2d 1. The Board's decision and order (Pet. App. 15a-32a) are reported at 168 NLRB No. 15.

JURISDICTION

The judgment of the court of appeals (Pet. App. 9a-13a) was entered on October 31, 1969, and a petition for rehearing was denied on December 2, 1969 (Pet. App. 14a). The petition for a writ of certio-

rari was filed on February 7, 1970. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

1. Whether the National Labor Relations Board properly ordered the company to recognize and bargain with the union as a remedy for its violations of Section 8(a)(1) of the National Labor Relations Act.

2. Whether the court below properly held that the company was responsible for the coercive statements of Foreman Synakowski.

STATUTES INVOLVED

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, *et seq.*), are set forth at pp. 2-4 of the petition. Also relevant are Sections 7 and 8(a)(1) of the Act which provide:

> Sec. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3).
>
> Sec. 8(a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

STATEMENT

The L. B. Foster Company processes industrial pipe at its Long Beach, California plant. George Chernove, plant superintendent, and Dudley Streetman, assistant plant superintendent, were directly responsible for plant operations (Pet. App. 22a). Under Chernove and Streetman was Foreman Martin Synakowski, who gave the shop and yard employees their daily work assignments and working instructions. In addition, Synakowski inspected the work of the shop employees, reprimanded them when he found their work unsatisfactory, and granted the employees' requests for time off without checking with his superiors. Although Synakowski did not have independent authority to grant employee requests for wage increases, he presented such requests to Chernove, together with his evaluation of the employees' capabilities; Chernove took this evaluation into account in determining whether to grant the requests. (Pet. App. 23a-24a; Tr. 58-66, 109-114, 140-143, 154-155, 157-159, 182, 184-187, 196-200, 213-217.)[1] The employees regarded Synakowski as their foreman; indeed, Chernove informed several employees when the previous foreman left,[2] that Synakowski would re-

[1] "Tr." references are to the stenographic transcript of the hearing before the Trial Examiner.

[2] The Company conceded the supervisory status of the previous foreman (Pet. App. 22a-23a; Tr. 304-306).

place him and they should take orders from Synakowski (Pet. App. 24a; Tr. 55-57, 109, 139, 156-157, 184, 196, 213-215).

On October 31, 1966, General Truck Drivers, Chauffeurs & Helpers, Local 692, International Brotherhood of Teamsters, began a drive to organize the Company's employees. It secured signed authorization cards [3] from 14 of the 18 employees in the bargaining unit that same day and, shortly thereafter, filed a representation petition with the Board. (Pet. App. 20a.) A Board election was scheduled for December 20 (Pet. App. 21a). Management immediately embarked upon an anti-union campaign.

Employee McLain, who signed a union authorization card on October 31, was questioned by Foreman Synakowski the next day about the outcome of a union meeting, because Synakowski "saw [McLain's] car parked in front of the union hall." Two weeks later, Synakowski admonished McLain that "Mr. Chernove was going to close the shop down if we get a union in here." Synakowski added that McLain "would have a job for a long time" if he would "talk to the boys and get them to get rid of this Union." Finally, on November 28, Synakowski told McLain that he was being laid off because "number one, your work is slow, and number two because of the Union." (Pet. App. 25a; Tr. 161-163.)

Employee Allen, like McLain, signed a union authorization card on October 31. A week later, Syna-

[3] The Company did not challenge the validity of the authorization cards (Pet. App. 20a; Tr. 48).

kowski informed Allen that management knew that he had "signed one of those cards." Synakowski later cautioned the workers: "you do nice work. Just leave the Union alone and you will be all right." (Pet. App. 26a; Tr. 201-203.) Synakowski also interrogated employee Montoya "about the Union" and, at the same time, warned him, "if the Union came in * * * all of us would be out of a job," but, if Montoya would abandon his organizational efforts, he might keep his job. When Montoya too was laid off on November 28, Synakowski commented that, if Montoya "had been cool and knocked the Union in the head, [he] would still be working there" (Pet. App. 25a; Tr. 187-188).

In mid-November, Plant Superintendent Chernove warned employee Majors that he "was going to have to lay you boys off, * * * mostly it is because of the Union." He added that, with the Union in, it would "be easier to get fired. The first morning you come in late, you will be fired." Chernove, at the same time, asked Majors to "talk to Herb [McLain] and the other boys and try to knock this Union out, and I will see what I can do for you." (Pet. App. 26a; Tr. 116, 117.) Majors was discharged on November 28. Synakowski explained, "You know it is because of the Union." (Pet. App. 25a; Tr. 115-116.)

In early December, Assistant Superintendent Streetman accused employees of having "knifed him in the back" because of their support of the Union. Street-

man made clear to 3 of the 9 unit employees[4] that "if anyone in the shop had a union card they wouldn't be working there" (Pet. App. 26a; Tr. 66-67, 95-96).

The Union lost the ensuing Board election by a vote of 2 to 3, with 10 challenged ballots[5] (Pet. App. 19a, n. 2). The Union filed objections to the election, which were consolidated for hearing with the present unfair labor practice case, which the Union had also initiated (Pet. App. 19a).

The Board found that the statements of Chernove, Streetman and Synakowski[6] were coercive, and that the Company thus violated Section 8(a)(1) of the Act (Pet. App. 26a-27a).[7] The Board also found that

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[4] Nine of the 18 unit employees were laid off prior to the December 20 election (Pet. App. 21a). However, the Union still had authorization cards from 5 of the remaining 9 employees (Pet. App. 28a).

[5] The Board's Regional Director sustained the challenges to 9 of the ballots on the ground that the employees involved, although listed on the payroll on October 31, had been lawfully discharged prior to the election without reasonable expectancy of recall. The remaining challenge, to the ballot of Martin Synakowski, turned on the issue of Synkowaski's supervisory status, which was left to be determined in the present unfair labor practice case. (Pet. App. 19a, n. 2.) Two employees were not able to vote, as the Company sent them on an overnight trip the day before the election (Pet. App. 21a, n. 11).

[6] The Board found that Synakowski was a supervisor within the meaning of Section 2(11) of the Act and that the Company was responsible for his coercive statements (Pet. App. 25a). The supervisory status of Chernove and Streetman was conceded (Pet. App. 22a).

[7] The Board dismissed an allegation that the Company also violated Section 8(a)(5) of the Act, finding that the Union had made no demand on the Company for recognition (Pet. App. 27a).

the Union had obtained valid cards from a majority of the employees authorizing it to represent them when it filed its petition for an election, and that "the only logical conclusion is that the Union's failure to obtain a majority in the election was due to the fact that [*sic*] extensive and flagrant 8(a)(1) conduct herein found, and which clearly had for its purpose the undermining of the Union and the destruction of its majority status, had the intended effect" (Pet. App. 28a). The Board concluded that, "In such a situation, only a bargaining order will restore the *status quo ante*, and prevent [the Company] from reaping the benefits of its unlawful conduct" (*ibid.*).

The court of appeals sustained the Board's findings and conclusions,[8] and enforced its order in full. The court found that a bargaining order was appropriate under the principles articulated in *National Labor Relations Board* v. *Gissel Packing Co.*, 395 U.S. 575. (Pet. App. 1a-7a.)

ARGUMENT

1. The court of appeals correctly applied the principles enunciated in *National Labor Relations Board* v. *Gissel Packing Co.*, 395 U.S. 575. Petitioner contends (Pet. 6-9) that *Gissel* is distinguishable because the bargaining orders there remedied violations of Section 8(a)(5), whereas here there was a

[8] The court did not find it necessary to rule on Synakowski's supervisory status, holding that, since Synakowski clearly was acting for the Company, his acts were attributable to it regardless of his supervisory status (Pet. App. 2a, n. 1).

violation only of Section 8(a)(1). The Court's rationale in *Gissel*, however, is not confined to refusals to bargain in violation of Section 8(a)(5). The Court noted with approval that the Board has long had a "policy of issuing a bargaining order, in the absence of a § 8(a)(5) violation or *even a bargaining demand*, when that was the only available, effective remedy for substantial unfair labor practices" (395 U.S. at 614, emphasis added).

Moreover, although three of the cases covered by the *Gissel* opinion were remanded for further findings, in one (*Sinclair*, No. 585) the Court sustained a bargaining order because the Board had made a finding, accepted by the court of appeals, that "the employer's threats of reprisal were so coercive that, even in the absence of a § 8(a)(5) violation, a bargaining order would have been necessary to repair the unlawful effect of those threats." *Id.* at 615. This was the situation here, for the Board found, with the concurrence of the court below, that the Company's coercive conduct was "extensive and flagrant" (Pet. App. 4a-5a).[9]

2. Petitioner's contention (Pet. 11-14) that it cannot be held responsible for Synakowski's state-

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[9] *National Labor Relations Board* v. *Patent Trader, Inc.*, 415 F. 2d 190 (C.A. 2), Board petition for rehearing in banc pending, does not require a contrary conclusion. The court there found that the violations of Section 8(a)(1) were not "flagrant" and that there were other special circumstances which militated against a bargaining order. Moreover, for the reasons set forth by Judge Feinberg in his dissent, the court's action in *Patent* is contrary to this Court's decision in *Gissel*.

ments because the court below did not rule on the Board's finding that he was a supervisor likewise presents no issue warranting further review. This Court has long held that an employer may be held accountable for the conduct of non-supervisory employees acting as his agent. See *Int'l Assn. of Machinists* v. *National Labor Relations Board*, 311 U.S. 72, 80. Since the Company had represented to the employees that Synakowski was their supervisor and the employees so regarded him (*supra*, pp. 3-4), there was ample basis for finding an agency relationship here.[10] *Betts Baking Co.* v. *National Labor Relations Board*, 380 F. 2d 199, 202 (C.A. 10).

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[10] Section 2(2) of the Act provides that the term "employer" includes "any person acting as an agent of an employer directly or indirectly." Section 2(13) provides that in determining whether any person is acting as an "agent" of another person "the question of whether the specific acts performed were actually authorized or subsequently ratified shall not be controlling."

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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